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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSE MIGUEL GARCIA-GUILLERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–23) is reported at 450 F. 2d 1189. The opinion and order of the district court (Pet. App. 11–14) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1971 (Pet. App. 25–26), and a petition for rehearing was denied on November 29, 1971 (Pet. App. 27). The petition for a writ of certiorari was filed on January 11, 1972. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

458-679—72

QUESTIONS PRESENTED

1. Whether Article VII of the extradition treaty between the United States and Peru, forbidding extradition if prosecution for the offense has become barred by limitation "according to the laws of the country to which the requisition is addressed," refers (where extradition of a Peruvian in this country is sought) to the federal limitations statute or to that of the state in which the fugitive is found.

2. Whether, if the state statute governs, prosecution was barred in the circumstances of this case.

STATEMENT

On October 6, 1970, the United States, on behalf of the Government of Peru, filed in the United States District Court for the Southern District of Florida a complaint seeking the extradition to Peru of petitioner, a former Director General of the Peruvian Ministry of Education then residing in Miami Beach, Florida, for prosecution for embezzlement as a public officer—an offense specifically covered by the treaty of extradition between the two countries proclaimed January 29, 1901 (Art. II, par. 6, 31 Stat. 1921, 1922) (Pet. App. 1–3, 11, 17–18). Following an evidentiary hearing pursuant to 18 U.S.C. 3184, the district court found that petitioner had in fact been charged in Peru with the offense and that there was probable cause to conclude he had committed it (Pet. App. 5, 11). The court accordingly ordered that he be committed to the custody of the Attorney General of the United States to await the issuance by the Secretary of State of a warrant authorizing his surrender to the

proper Peruvian authorities (Pet. App. 5–6). Before the Secretary of State acted, however, petitioner filed in the same court a petition for a writ of habeas corpus challenging the validity of the commitment order (Pet. App. 7–9). Following another evidentiary hearing, another judge of the court, noting that habeas corpus lies in extradition proceedings only to inquire whether the committing court had jurisdiction, whether the offense charged was within the treaty, and whether there was any competent evidence supporting the finding of probable cause (see *Fernandez* v. *Phillips*, 268 U.S. 311, 312), concluded that the commitment order was valid and dismissed the petition (Pet. App. 11–14). The court of appeals affirmed (Pet. App. 17–26).

ARGUMENT

Petitioner's only contention in this Court is that his extradition is barred by Article VII of the treaty, which provides that extradition shall not be granted "if legal proceedings or the enforcement of the penalty for the act committed by the person claimed has become barred by limitation, according to the laws of the country to which the requisition is addressed." 31 Stat. 1925. He relies, as he relied below, on Florida's two-year statute of limitations for non-capital offenses.[1] Both courts below, without considering whether prosecution for the offense charged was barred if the Florida statute was applicable, rejected the conten-

[1] Formerly Fla. Stat. 932.05, now Fla. Stat. 915.03. In the case of embezzlement by public officers, an offense proscribed by Florida law, see Fla. Stat. 812.10, the prescription period commences with the retirement of the offender from office (formerly Fla. Stat. 932.06, now part of Fla. Stat. 915.03).

tion on the alternative grounds that the claim (1) was noncognizable on habeas corpus review and (2) in any event lacked merit because the applicable limitations period was that prescribed (for non-capital offenses) by the federal statute, 18 U.S.C. 3282, five years (Pet. App. 12, 22, n. 1).[2]

1. The courts below were correct in holding that the federal limitations statute, not Florida's, applies.[3] At least where, as here, the offense for which extradition is sought is also an offense under federal law (see 18 U.S.C. 643: embezzlement of public funds by federal officers), the reference in Article VII of the treaty to "the laws of the country to which the requisition is addressed" would seem to refer to the laws of the United States. Cf. *Merino* v. *United States Marshal*, 326 F. 2d 5, 12 (C.A. 9), certiorari denied, 377 U.S. 997 (extradition for identical offense under similar treaty provision; federal limitations statute applied).[4] This Court has refused to interpret an extradition treaty so as to "restrict the reciprocal operation of the treaty" by making "the right to extradition from

[2] It is undisputed that prosecution was not barred if the federal statute governs.

[3] In light of the treaty's specific prohibition of extradition where prosecution has become barred by limitation within the meaning of Article VII, we do not rely on the courts' holding that the limitations issue is not subject to habeas corpus review.

[4] Petitioner relies on *In re Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala.) to support his position that the state statute of limitations applies (Pet. 11–12). However, the decision in that case refusing extradition was based on unrelated grounds (the denial of a speedy trial and the political character of the offense) (187 F. Supp. at 721). Moreover, the offense there involved, simple embezzlement, was not punishable—as the offense involved here is—under a generally applicable federal statute.

the United States * * * vary with the state or territory where the fugitive is found * * *." *Factor* v. *Laubenheimer*, 290 U.S. 276, 300. Under petitioner's proposed construction, on the other hand, it would be advantageous to the absconding fugitive to select a state in this country with a relatively short prescription period in which to settle. The construction adopted below is also supported by the general rule for construing extradition treaties laid down by this Court in the *Factor* case, that such treaties should be interpreted liberally in favor of the extradition rights claimed under them—that, in other words, "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it [sic], the more liberal construction is to be preferred." 290 U.S. at 293–294.[5]

[5] Petitioner's reliance on Article 4 of the Draft Convention on Extradition, published in 1935 under the auspices of Harvard Law School (29 Am. Journ. Int. Law, Supp., Part I, p. 99) (Pet. 10–11), is mistaken. Nothing in the Article or the accompanying Comment (*id.* at 99–107), as the court of appeals noted (Pet. App. 22 n. 1), gives any support to petitioner's suggestion that "the laws of the country * * *" to which the treaty refers mean state laws. The Article, entitled "Lapse of Time," provides that the requested State may decline to extradite the person sought if he has become immune from prosecution or punishment by reason of lapse of time under the law of the requesting State, or if "under the law prevailing in that part of the territory of the requested State in which the person is apprehended" the person, at the time the requisition is received, would be immune from prosecution or punishment (by reason of such lapse) if the act had been committed within the territory of the requested State. The "States" referred to are, of course, as the context makes evident, whatever *countries* might adopt the proposed Convention. And as the Comment makes clear, the purpose of the clause "under the law prevailing in that part of the * * * requested State in which the person is ap-

2. Although the question need not be considered if the federal statute governs, petitioner's extradition, as we have contended throughout the proceedings, is not barred even if Florida's two-year prescription period is applicable. The pertinent facts are these: Petitioner quit his Ministry position on October 3, 1967, and the prescription period (he concedes) commenced to run from that date (A. 47, 58).[5] On February 13, 1969, the General Comptrollership of the Republic reported petitioner to the First Trial Court of Lima following an audit of his accounts (A. 131–132; Tr. 62–63). On May 14, 1969, the Fiscal Police, following an independent investigation, reported him to the Fifth Trial Court (A. 132; Tr. 73–74). The latter court, upon being advised that the First Trial Court was examining the earlier reference, ordered the criminal record transferred to that court, which, on May 16, 1969, directed that the proceedings be consolidated (A. 132–133). In the meantime, on March 13, 1969, a judge of the First Trial Court known as an "instruction" judge, whose functions corresponded roughly with those of a grand jury, had issued a pro-

prehended" is simply to require that the law of the requested State (which is to be examined to determine whether immunity has been acquired) "be in force in" the part of that State where the person was found (*id.*, pp. 81, 84, 89). Had the proposed Convention been in force and been applicable here, the requirement of the clause would have been satisfied since the federal limitations statute is in force in the part of the United States, Florida, where petitioner was apprehended.

[5] "A." refers to petitioner's appendix in the court of appeals, a copy of which is being lodged herewith. "Tr." refers to the transcript of the extradition hearing, a copy of which is on file in the Clerk's office (document marked "Transcript of Proceedings, November 25, 1970, and other dates").

visional arrest order directing that petitioner be taken into custody and brought before him, in order that his statement concerning the charges might be taken—a routine step in Peruvian criminal procedure (Tr. 58-60, 67-72; A. 133).[7] Upon learning that the arrest order could not be enforced due to petitioner's absence from the country, and believing that the evidence of his guilt was such that petitioner's presence was necessary to complete the proceedings, the instruction judge transmitted the pertinent documents to the Supreme Court of Peru with the request that it authorize extradition proceedings (A. 101, 142-143; Tr. 76). On December 4, 1969, the Supreme Court declared the request in order and the extradition proceedings followed in due course (A. 101, 143).

It appears from this chronology that Peru commenced its criminal accusatorial processes well within the putative two-year prescription period. The issuance of the provisional arrest order within 18 months of the beginning of the period is especially significant from the standpoint of Florida limitations law. Cf. *Dubbs* v. *Lehman*, 100 Fla. 799, 130 So. 36 (issuance of arrest warrant tolls running of statute). Thus, it is irrelevant that the Peruvian Supreme Court's authorization of the extradition proceedings

[7] The order is called "provisional" because the judge is authorized to release the accused and terminate the proceedings if, after taking his statement, he concludes the evidence is insufficient to require him to stand trial (Tr. 59-60). If he concludes otherwise, the order is made absolute (Tr. 60). The order in petitioner's case read, in part: "* * * Let the case be opened against [petitioner] * * *; let the proceedings start about the accused against whom there is the order of provisional arrest * * *" (Tr. 67-68).

occurred two months after the lapse of the period and that the extradition complaint was filed in the federal district court in this country some ten months later (October 6, 1970). Hence, prosecution has not been barred within the meaning of Article VII even if the Florida limitations statute be deemed applicable.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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